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CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE COURTS

REPORT OF THE ACCESS TO JUSTICE TASK FORCE

Note: This report was developed in part under a grant from the State Justice Institute, in part under a federal grant provided by the Massachusetts Committee on Criminal Justice, and in part with funds appropriated by the Massachusetts General Court. Points of view expressed herein do not necessarily represent the positions or policies of the grantors.

Note: This report records the work, findings, and recommendations of the Commission's Access to Justice Task Force. The views expressed herein are the task force's and do not necessarily express the views of the Commission.

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ACKNOWLEDGMENTS

In May 1990 the Chief Justice of the Supreme Judicial Court, Paul J. Liacos, asked the members of this task force to join the Commission on the Future of the Courts and to concentrate our work on the issue of access to justice. We little knew then but now shall long remember the enormity of the task that confronted us. We cannot say that we have succeeded in either understanding justice or in describing a system that will dispense justice now or 30 years hence. We do believe that we have been enriched by the experience and hope that our thoughts on this matter will stimulate others to grapple with the perennial issue of how we may as human beings live humanely with one another.

Justice underlies democracy. If we do not live justly with one another, there can be no justice. As we have tried to determine what justice could be and how close to it we can come, we have been greatly aided by those who daily confront justice and by our reporter.

In a series of public hearings around the state, we heard from litigants, lawyers, judges, those who work in the court system, and those who feel denied access to justice. From them we learned of their struggles, their passion for justice, their pain, and their practical suggestions for making the system of justice more accessible to all. Sarah Robinson, the reporter for the task force, brought with her a wide and deep knowledge of the ways in which people of many ages and cultures have thought about justice. More important, she brought her own passion for justice and for excellence in understanding and interpreting what we heard at the public hearings, and her skill as a writer, which enabled her to distill philosophy and life into a challenging and comprehensible document.

The desire for justice is at the core of human existence. We are grateful for having had the time and opportunity to consider together what justice means for each of us now and in the future.

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VOICES OF THE PEOPLE

There should be some arm of the court there to show that it's not "big brother," that it's sensitive, to make people feel welcome when they walk up the steps to the courthouse, that it's not a big monster, that it's their right to walk into that courtroom and stand up for whatever reason -- not with a heavy heart but feeling that people will relate to them.¹

We have a system that is white. I don't know any other way to describe it. We have a white judicial system which is increasingly dealing with people of color. When you stand in a court and all of the people in power are white and you are not, you feel as if you might as well be in South Africa or back in the '50s in some small town because you don't feel that you have a chance, that you have been judged before you have walked into the doors, and that there is nowhere and no place for you to turn.²

I feel somewhat qualified to speak because I came to the court with a domestic problem looking for redress. Since then I've been before 12 different judges in half a dozen courts in Middlesex County. I live in Lowell, and it was traumatic when I was told to make nursery school arrangements for my children and appear in Cambridge. And when I did, the case was postponed for a week and I was told to go to Concord. The next week I had to go to Marlborough in my rickety old car. . . . I've spent \$30,000, and I don't want you to think I didn't get something for my money. When my case comes before a judge I know which one it is. I have three or four milk cartons full of papers. If I'd spent the \$30,000 on tuition, I'd have to write a thesis, and they might not agree with me, and they might not grade me very highly, but at least someone would have read what I wrote. . . . When I first went to court I was really frightened. Not any more. I've been to court more times than L.A. Law. But it's not right that a judge who knows almost nothing about the history of my case and has no time to learn has to make quick decisions about my life: when I'll see my children, when I won't see my children, how much money I'll get,

¹ Paul Faucher, Joey Fournier Victim Services, testifying at the Access to Justice Task Force's public hearing in Springfield, November 14, 1990.

² Leslie Harris, Esq., Roxbury public hearing, February 13, 1991.

what holiday I'll get them. My husband says I'm mentally ill, schizophrenic, the whole nine yards. You're not looking at schizophrenia. You're looking at sleep deprivation. I work two jobs and I get \$15 a week child support. . . . I know I sound bitter, but I really don't blame the judges. They are totally overwhelmed and ill-equipped to handle these social problems.³

As the only practicing Vietnamese attorney in Massachusetts who has helped citizens and immigrants of Vietnamese, Cambodian, Laotian, and ethnic Chinese origin, I think I can say on their behalf the coming from that part of Asia where we suffered nearly half a century of civil and international war and consequent oppression on the pretext of national security and communist orthodoxy, we value very much THE RULE OF LAW according to which the COURTS ARE THE ULTIMATE ARBITERS THAT PROVIDE ULTIMATE PROTECTION FOR CITIZENS BY MEANS OF EQUAL ACCESS TO EQUAL JUSTICE UNDER LAW.⁴

³ Barbara MacInnes, litigant, Lowell public hearing, Nov. 13, 1990.

⁴ Tai Van Ta, Esq., Boston public hearing, Nov. 20, 1990 (written submission of oral testimony).

[Every person] ought to obtain right and justice freely, and without being obliged to purchase it; compleatly, and without any denial; promptly, and without delay; conformably to the laws.

Part One, Article Eleven, of the Declaration of Rights,
Constitution of the Commonwealth of Massachusetts, adopted 1780.

A VISION OF THE JUSTICE SYSTEM IN 2020

We envision a justice system in 2020 that creates and reflects the values of a just society. These values are moral and political equality, the inherent dignity of each human being, mutual respect for differences among human beings, fairness, full participation in political and social life, and an ethic of shared responsibility for one another and for our world. We see in 2020 a society that acknowledges and cherishes these values, that realizes these values in its institutions, and that has extinguished much of the hypocrisy that attends our present commitment to these values.

We see in 2020 a justice system that leads society in recognizing these values, not one that drags behind and resists change. We see a justice system that embodies these values in its procedures and in its substantive rules. We see a justice system whose purpose is to bring these values to other social institutions, both to those we now call "private" and to those we now call "public."

There are apparent contradictions in the values we envision at the center of the justice system. One value is the inherent dignity of each person. Another is the value of shared responsibility and mutual interdependence. The first stresses the importance of the individual, the second the importance of the community. In our vision of the future, there is no real contradiction, and both values flourish.

The justice system of 2020 will be an institution suited to change. It will be an institution that recognizes the fact of rapid and significant change in society, and it will be constructed such that it can both anticipate and respond to social change. It will be itself an institution that changes. The justice system we envision is dynamic, not static. Its procedures will be flexible, and its structure and processes will be open to continual revision.

In our vision of the future, courts will continue to be the public institution to which individuals and groups turn for redress when other social and public institutions have failed. Courts will continue to develop as the institution where we can go to obtain justice and, in seeking and finding justice, to further our sense of what justice is and what justice requires.

The future we envision is political, not technological. We perceive that we have an ability to shape the future, that it is a matter of conscious, willing choice. We do not make the naive claim that we can control or even predict events in the future. We do claim, however, that we can muster the will and the care to bring forth our better selves to greet and shape what comes and,

in so doing, create a society far more just than the one we know today. A first act in creating that society is to imagine it. "If something can take place in the world of the imagination, it can take place."⁵

⁵ Zelda Fichandler, "Prescriptions for a National Acting Company," *New York Times* (August 4, 1991) H13. Ms. Fichlander states (*id.*):

It is impossible to overestimate the educative power of [an acting] company made up of people of ethnic and racial diversity. A demonstration of how we can perform, take action, in concert, becomes a model for the world at large. If something can take place in the world of the imagination, it can take place.

POINTS OF DEPARTURE

This report is the product of three main activities by the Access to Justice Task Force.⁶ The first was a series of public hearings held around the state (in Lowell, Worcester, Springfield, downtown Boston, and Roxbury) between November 1990 and February 1991. Second, task force members participated in several sets of "futuring" exercises led by futures studies specialists (two sets with the entire Commission and one for the task force individually). Third, the task force held regular working meetings from June 1990 through August 1991.

In our hearings, we asked members of the public to help "create a vision of what the Massachusetts judicial system should be in the 21st century, regarding access to justice issues."⁷ We asked the public to consider, among others, the following questions:

How should the future justice system be structured so that geographic, physical, economic, and linguistic barriers are eliminated or reduced?

What changes in society might affect a future justice system as it relates to access?

What is the ideal accessible judicial system in the 21st century?⁸

Research activities broadened the information gathered in public hearings, futuring exercises, and discussion meetings. Gerry Singsen, Director of the Program on the Legal Profession at Harvard Law School, presented a talk to us on the delivery of legal services to moderate income people. Our reporter, aided by Commission staff and interns, performed additional research, and Commission staff provided numerous materials to task force members. In the main, however, this report is not the product of research. Instead, it is the product of intense reflection and discussion about the future we envision.

⁶ Ruth Batson and Lonnie A. Powers, Esq., co-chairs; Hon. Christopher J. Armstrong, Regina F. Lee, Esq., Hon. Mary B. Muse, and Margaret D. Xifaras, Esq., members; sociologist Dr. Margot Kempers, special adviser; and Sarah Robinson, Esq., reporter.

⁷ Supreme Judicial Court Media Advisory, November 1, 1990 (announcing Springfield public hearing).

⁸ *Id.*

Crucial to this discussion were the comments offered by the members of the public who testified at our hearings or wrote to us. We heard from individual litigants, private attorneys, legal services lawyers, representatives of community groups and public service organizations, judges, court clerks, teachers, and many others. Their insights offered us a chance to see the justice system from their many different points of view.

We used these insights and visions, along with our own collective experience in the law, in our attempt to imagine the future.⁹ We spent a good deal of our time thinking and talking about what we believe a commitment to "access to justice" should mean. From there, we went on to consider what a commitment to access to justice would mean, in practical terms, for the justice system in 2020. We concluded, as we detail below, that bringing about real access to justice in the year 2020 will require deep, structural changes in the justice system, in society, and in ourselves.

Part One of this report, "Concepts and Definitions," sets forth our understanding of several key concepts, including "access," "justice," and the "justice system."

Part Two, entitled "The Inaccessibility of Justice Today," describes the ways in which our current justice system often obstructs members of society from attaining justice. Many of the insights put forward in this section were provided by public testimony. While our report focuses on the future, we are keenly aware that the future unfolds from the present. We believe that we must understand current barriers to justice to create a future without such barriers.

Part Three, "Creating the Future," opens by describing societal trends -- such as immigration, the growing gap between poor and rich, and the aging of the population -- that could shape the future of Massachusetts society and the effects these trends could have on the justice system in 2020.

Part Three then prescribes in detail the structure and function of a justice system in 2020 that we believe would provide access and justice to all members of society. This detailed picture fills out the vision sketched in broad outline at the start of our report. Lastly, Part Three sets forward some ideas for creating a just society in 2020. It is impossible, we believe, to attempt to create a justice system that provides access and justice to all without also thinking about how we can

⁹ In the course of our work, we became aware of research that has been done in numerous disciplines relevant to our efforts here. We have not explored this research in any detail, however, we recommend that future efforts be interdisciplinary.

create a just society (or at least a more just one than the one we inhabit today). Our ideas are simple and direct and are expressed succinctly in the words of Paul Faucher, the father of a murdered teenager, who testified at our Springfield public hearing: "Access to justice, what's it mean in 2020? EDUCATION -- EDUCATION -- EDUCATION."¹⁰

Part Four summarizes our report by listing our recommendations for change. We group these recommendations into three categories: (1) immediate or short-term recommendations, (2) medium-term recommendations, and (3) longer-term recommendations. We believe that the recommendations in the first category should be implemented today, those in the second should be implemented as soon as possible (at least within next five years), and those in the third should be implemented over time (and that the ways to implement them will become clearer over time and as the immediate and medium-term recommendations are implemented). In this way we believe we can begin to create a system of justice that truly deserves the name, justice system.

¹⁰ Paul Faucher, *supra* note 1.

PART ONE: CONCEPTS AND DEFINITIONS

I. ACCESS TO JUSTICE

A. What Does "Access to Justice" Mean?

It is not simply access to courts, lawyers, or judicial process. In the legal profession the term access to justice is sometimes used to mean access to courts or to lawyers. The American Civil Liberties Union, for example, uses the term to refer to the "right of a litigant in the United States to judicial process" and draws upon the concept of due process to state that three elements form the core of this right: "notice, opportunity to be heard and to defend, [and] orderly proceedings adapted to the nature of the case and controversy."¹¹

Others define access to justice more broadly. A worldwide study of access to justice published in the 1970s took the view that:

The words "access to justice" are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system -- the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially just. *
* * [Our] basic premise will be that social justice, as sought by our modern societies, presupposes effective access. [Emphasis in original.]¹²

Under this broader view, access to justice is not achieved unless results are individually and socially just; and effective access, equally available, is essential but not necessarily sufficient to ensure that results are just.

To us access to justice means more than simply access to courts, lawyers, or judicial process. Access to justice means a fair opportunity for a just result to be achieved. Ensuring

¹¹ Access to Justice Project, American Civil Liberties Union, *Justice Evicted: An Inquiry into Housing Court Problems* (ACLU, 1987) 1-2.

¹² M. Cappelletti and B. Garth, "Access to Justice: The Worldwide Movement to Make Rights Effective, A General Report," in Cappelletti and Garth, ed., *Access to Justice*, Vol. 1 (1978) 6.

access to courts, lawyers, and judicial process can be integral to justice; they are often prerequisites for attaining justice in our society. However, the presence of an attorney or the existence of a judicial forum do not themselves assure that justice is done. For that reason, we do not believe that a commitment to access to justice ends with ensuring access to courts, lawyers, and judicial process.¹³

It involves our most basic commitments to democracy and equality. In a just society all people would have justice because they are a part of that society. Access to justice was born, as an idea and as a commitment, out of the recognition that our society is deeply unjust. The concept of providing access to justice would not have developed in a just society. The concept "access to justice," while signaling the existence of deep injustice in our society, also signals our strong passion for justice. This passion makes us believe that we can make our society more just and fuels our desire to cut paths to make it so. One such path will be cut by making access to justice a reality. To understand this path, we must explore what we mean by justice and by access, and how the two combine to form the concept of access to justice.

B. Our Concept of Justice

As a culture and as a political community, we share certain basic ideas about what makes a society just. We could not claim, as we do, that our society is unjust unless we had some idea of what makes a society just or unjust. There are, of course, many different answers to the question "what makes a society just" (and to the even more plaintive one, "is a just society

¹³ Compare the following statement on "defining access to justice" from *Civil Justice: An Agenda for the 1990s*, Report of the ABA National Conference on Access to Justice in the 1990s (American Bar Association, 1991) 25:

For both low- and moderate-income persons, the concepts of access to justice and the delivery of legal services should not be viewed as synonymous with access to an attorney, access to judicial process, or individual representation. For both groups, a broad range of strategies, services, providers and fora should be available [emphasis in original].

possible")¹⁴ and many different contexts in which the term justice is invoked.¹⁵ Despite these many different meanings, a few ideas form the core of our own concept of justice in the Commonwealth, in the United States, now, and we hope 30 years and more into the future.

Our concept of what makes a society just revolves in large part around an idea and ideal of democracy.¹⁶ Democracy is the idea that political sovereignty should be in the people, that the just society is one in which people join together and rule themselves. At the center of this idea of democracy is the premise that, as a moral and political matter, all people are equal and that each person can and should participate, albeit in a myriad of different ways, in the life of the community. Our concept of democracy, and therefore of justice, rests on twin pillars of equality and full participation.

While as a moral and political matter people are equal, people are in fact very different from one another. People have different beliefs, different histories, different perspectives, different interests, different talents, different goals, and so

¹⁴ Plato's *Republic*, for example, is a mediation on the question "what is justice." For an introduction to many different theories of justice, see R. Solomon and M. Murphy, ed., *What is Justice? Classic and Contemporary Readings* (Oxford Univ. Press, 1990) (collected writings on justice from diverse sources -- mostly western -- including 18th century political philosophers, contemporary philosophers, Greek philosophers, the Bible, the Koran, and the U.S. Declaration of Independence).

¹⁵ We talk not only of whether a society is just, but also of whether laws are just or unjust. We talk as well of the justice -- or injustice -- of an individual act. We invoke the word justice in each of these contexts freely, often, and passionately. For example, Louis Elisa, President, NAACP, Boston branch, testifying at our Feb. 1991 Roxbury hearing, declared that we must "let people know the courts are about justice, not a system of moving things along."

¹⁶ Our state and federal constitutions prescribe a system of constitutional democracy. The reigning idea behind the tripartite structure of our government -- with its executive, legislative, and judicial branches -- is that we subject ourselves to majority rule, as articulated by our elected representatives, but that the rights of individuals operate as limits on the power of the majority to rule. Hence we think it just for the people to rule themselves, by majority vote of elected representatives, and we also think it just to limit the power of the majority when it threatens to encroach on certain rights of individuals.

on. Our concept of justice recognizes and builds on the fact of these differences. To say that people are equal is not to say that they are the same. To say that each person can and should participate in the life of the community is not to say that each person can or should participate in the same way. Quite the contrary is the case. Equality means that, as a moral and political matter, each person deserves equal concern and respect,¹⁷ and this includes respect for the mix of characteristics that defines each different person. Participation means that each person can and should participate in public life and should bring to that participation her or his own different point of view, background, dreams, and the like.

To clarify, when we say people are different, we mean different from one another; we do not mean different from those who have created and controlled the justice system, i.e., white men. For the history of the Commonwealth, the measure of a person's fitness to participate in public life has been how well she or he conforms to the model of a fictional, generalized, able-bodied, English-speaking, property-owning, white man. The use of this measure, or any other so-called norm, contravenes our concept of justice. A real democracy, in which all people are treated with equal concern and respect and in which all people participate in the public life of the community, simply cannot be achieved when this measure, or any similar abstraction, is used.¹⁸

Most people in the Commonwealth's population now and in the past have failed to meet the measure of the idealized white man (including, in fact, many white men). Therefore a large majority of the population has been denied treatment as equals and has been denied any significant role in the public life of the community. Our concept of justice is far from being realized today; hence our view that, today, our society is unjust.¹⁹

¹⁷ Ronald Dworkin writes that the central postulate of justice is equality. To him, the concept of equality means that each person has the "right to equal concern and respect." Dworkin, "What Rights Do We Have?" reprinted in *Taking Rights Seriously* (Cambridge: Harvard Univ. Press, 1977) 266, 273.

¹⁸ See Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell Univ. Press, 1990).

¹⁹ We note the wise words of philosopher Hanna Pitkin: [T]hough we learn the meaning of terms like "justice" and acquire some standards of what is just in connection with existing institutions and practices, we can and do use them to criticize and change those institutions and practices.

C. Our Concept of Access

Providing daycare facilities in courthouses, weekend and evening hours of operation, handicapped access ramps, information booths at the entrances to the Commonwealth's courthouses, and skilled, sensitive court interpreters are just a few of the small and relatively obvious steps we can take to improve access. Each of these steps literally opens a door, and holds it open, for people who have been effectively prevented from "entering" the courthouse. These and other such steps (described in Part Three) are pre-requisites to access. However, they do not alone assure real access.

Real access will also require steps to create a justice system that truly belongs to the public. These steps, harder to identify and even more so to implement, involve instilling in court personnel the idea that their job is to serve (and, in serving, respect) all members of the public, and instilling in litigants the idea that they have a right -- and a responsibility -- to challenge poor treatment and to participate fully in creating the law that governs their affairs.

In a statement with which we wholeheartedly agree, Judge Gordon Martin of Roxbury District Court testified that "access means a feeling of belonging and understanding what's going on."²⁰ We also agree with Marnie Warner and Donald Dunn, both law librarians, who stressed that access to justice requires

* * *

[I]t is amazing how blind we can be to the social facts around us, how much habituated to the traditional or accepted ways of thinking, how reluctant to think critically on our own, because critical thought, once begun, is likely to require of us remedial action. But the possibility for critical thought and remedial action is always there, and it is kept alive precisely by the meaning of concepts like "justice[.]"

* * *

[I]f the idea of justice is a sham, then reform, revolt, or maintenance of the status quo are all equally pointless.

Pitkin, *Wittgenstein and Justice* (Berkeley: Univ. of California Press, 1972) ch. 8.

²⁰ Roxbury public hearing, February 13, 1991.

access to information.²¹ However, information, critical as it is, does not create understanding. Additional measures are necessary to turn information into understanding. And even understanding does not necessarily bring about the sense of belonging.

Not everyone lacks a sense of belonging. Perhaps the best way to understand that sense of belonging is to consider the case of those who have it. Consider the case of the "propertied adult males of sound mind" in this description of the history of Anglo-American law:

The entire legal system in Great Britain and in the United States until the twentieth century was confi[n]ed exclusively to propertied adult males of sound mind. These men sat in the legislatures and enacted the laws; they had a monopoly of the legal profession that litigated important issues; and most significantly, they were the judges who interpreted the laws and created the great body of jurisprudence known as the common law.²²

While this excerpt does not state that propertied adult males had (and have) a sense of belonging, this is its clear implication. These men created the system of justice; and, having created it, they knew it belonged to them. This is a sense of belonging.²³

Consider also the recent case of Teresa Fischette, an airline attendant who fought her employer's decision to fire her

²¹ See written submission of Marnie Warner, Law Library Coordinator, Trial Court of the Commonwealth, dated Dec. 6, 1990, and testimony of Donald J. Dunn, Law Librarian and Professor of Law, Western New England College of Law (Springfield public hearing). See also letter from Massachusetts Commissioner for the Blind, Charles H. Crawford, dated Dec. 17, 1990 ("Access to justice is clearly tied into access to information"). See generally M. Ethan Katsh, *The Electronic Media and the Transformation of Law* (New York: Oxford Univ. Press, 1989).

²² Lois G. Forer, *Unequal Protection: Women, Children, and the Elderly in Court* (New York: W.W. Norton, 1991) 31.

²³ The purpose of this example is to illustrate the circumstances in which people may truly be said to have access to justice and to suggest that, according to this depiction of the Anglo-American system, propertied men had (and still have) access to justice. It is not to suggest that under the system Forer describes there was no access to justice for anyone but these propertied men.

because she would not wear face make-up.²⁴ After her employer admitted that it had been wrong and invited her back, she mused, "On spaceship Earth there are no passengers. Only crew."²⁵ This is a sense of belonging; it is a sense of power within and responsibility for the society of which one is a part.

Most people who use (indeed, depend upon) the justice system do not have this same sense of power and responsibility. They do not believe that the justice system belongs to them and some may doubt even that they are entitled to justice. This should be no surprise. Most people have not had a hand in creating the justice system. Most people have not contributed to the system's standards, rules, procedures, and rationales. Most people find these rules and rationales foreign. Most people have a passive relationship with the justice system. The system merely acts upon them. This is not a sense of belonging, where the public feels it owns and is responsible for the justice system. This is not the justice system of a real democracy.

In the pages that follow the task force emphasizes responsibility as a mechanism of change: the responsibility of individuals as citizens to participate in community life, the responsibility of court personnel as public servants to treat court users with respect and dignity, and the responsibility of attorneys as officers of the court to help ensure every person's vital legal needs are being met.

In sum, we understand that true access to justice is needed to make real our commitment to democracy. If we fail to provide access to justice, we signal an ambivalence, or worse an outright hostility, toward democracy.

II. THE JUSTICE SYSTEM

A. What Is the Justice System?

We understand the term justice system broadly. The term is often used to refer to courts, which are of course integral to the justice system. We understand the justice system to include the courts and several institutions, public and private, ancillary to the courts. These are state and local law enforcement (police officers, district attorneys), jails, prisons and related staff (probation officers, parole boards), and attorneys and other legal workers (the private bar, legal

²⁴ Diane E. Lewis, "Continental Makes Up; Airline Rehires Ticket Agent Fired for Refusing Cosmetics," *Boston Globe* (May 16, 1991).

²⁵ *Id.*

services attorneys, public defenders, the office of the attorney general).

Further, we understand the term justice system to involve the legislative and executive branches of state government. Thus we mean it to include the Massachusetts legislature (known historically as the General Court) and the office of the Governor, the various executive agencies charged with implementing the laws -- prime examples are the Department of Social Services (DSS) and the Department of Youth Services (DYS) -- and other administrative and quasi-judicial agencies and commissions, such as the Massachusetts Commission Against Discrimination (MCAD).

While we believe the justice system involves these numerous institutions and that achieving the future we envision requires reforms in each of these institutions, our focus here is on the court system and those institutions (the bar, for example) that work intimately with it. Hence our detailed vision in Part Three describes only this part of the justice system.

B. The Role of the Justice System in Society

The justice system and society are interdependent. The justice system has a complex, multifaceted relationship to society. It is an important component of our society, and it reflects society's values and norms. It is, at the same time, a source of norms and values. For example, school desegregation cases have advanced the cause of civil rights and eliminating institutionalized racism in our society.

Courts have become social service providers. Many people observe that social conflict is on the rise, that private means of preventing or resolving social conflict (the institutions of the family, religious and charitable organizations) are increasingly ineffective, and that public means to do the same (various social service agencies) are underfunded, overwhelmed, and therefore unable to contain and prevent conflict. As a result of this rise in conflict and this incapacity of our non-judicial social institutions to prevent or resolve conflict, people are carrying more of their burdens into court. People seek from courts the "last word," a definitive and effective solution to their problems.

One member of the public captured these thoughts in her statement to the Commission:

Our judicial system is called upon to redress and resolve a broader range of issues than the court systems of virtually every other country. . . . [The Probate and Family Courts are] serving as an emergency

room for the rendering of social services. Just as medical patients, lacking an entree into the health care system, are now overloading emergency rooms with complaints once handled by family physicians, so families experiencing a variety of severe social stresses are overwhelming our family courts.²⁶

This individual was one of many to invoke this emergency room metaphor. By painting this picture of the courts, the speakers seemed to make several points. (1) People go to court because no other institution is available or able to meet their needs; people have nowhere else to go. (2) Courts were not originally designed (as emergency rooms were not) to provide the kinds of services that the people who come before them now require. (3) Courts administer relief aimed at reducing acute pain but do nothing, or very little, to cure the underlying disease. As an example, courts can and do issue restraining orders against abusive family members, but they have few resources to identify underlying causes of abuse or to fashion solutions that will prevent abuse from recurring. More important, the order is a piece of paper only. It does not provide physical protection if the abusive person is determined to inflict injury or death.

²⁶ Letter from Prof. Mary E. O'Connell, Northeastern University School of Law, dated Dec. 13, 1991.

PART TWO: THE INACCESSIBILITY OF JUSTICE TODAY

I. "BARRIERS" TO JUSTICE

Justice is inaccessible today for a large majority of the Commonwealth's population.²⁷ A complex of factors, many of which are not fully understood, makes this so. Some factors are intrinsic to our system of justice, both in theory and in practice. For example, theoretically, adversarial proceedings produce truth, and truth leads to justice.²⁸ However, in reality, adversarial procedures do not always produce justice, as shown in family disputes.²⁹ Other factors that are barriers to justice are common court practices and procedures: rigid procedural requirements, legal language (which only legal "professionals" speak and understand), and scheduling practices that lead to prolonged, unexplained delay.³⁰

Extrinsic factors making justice inaccessible today are outside the realm of the justice system. Poverty and prejudice, for example, are pervasive throughout society and do not stop at the courthouse door. These factors impede access to justice in two different ways. First, societal ills infect the justice system in the same manner as they are manifested in society (court personnel bring their personal prejudices to their jobs, poor people who cannot pay their rent or buy sufficient food also cannot afford to hire a lawyer, etc.). Second, people who suffer

²⁷ Lois Forer, a state trial judge in Philadelphia, believes that women, children, and the elderly -- who together form a large majority of the population -- are denied justice by the procedures, processes, and rules of American law. See *supra* note 22. See also, Massachusetts Legal Assistance Corporation, *Massachusetts Legal Services Plan for Action* (Nov. 1987).

²⁸ There is considerable debate on the relationship between truth and justice, however, some contend that they are not necessarily related.

²⁹ Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, 1976) 80-102.

³⁰ Consider the testimony of Leslie Harris (Roxbury public hearing):

We have to take the fear of the system away from the people who must walk through these doors. I remember my first time standing in front of the judge as a lawyer. I was convinced everyone could see my legs shaking, and they felt so weak. If I felt that way and I was representing the person, how must that person have felt?

the effects of poverty and prejudice come in large numbers to seek judicial relief. As we described above (see p. 16), courts have become the social service agency of last resort. These cases, many of which the courts are ill-equipped to handle, pile up and inhibit access and justice for those parties and for other litigants.

Before continuing, the task force believes it is important to acknowledge ways in which the justice system is working and to build upon that in the future. The task force recognizes and appreciates the many good people in the system today. For example, as part of efforts to involve the court in the community, court and probation officers played basketball at a Dorchester housing development in June 1991. Probation officer Robert Spencer explained, "I live in this community, but people never see us in sneakers and T-shirts. We want them to know we're just like them."³¹ Dorchester District Court Judge Darrell Outlaw, who organized the event, added "If the only way to get them together is on a basketball court, then let's get them together and get the message out to them. . . to tell them they have a friend in court."³²

Other examples of restoring the court's credibility to the community include:

- streamlining a cumbersome system to ensure speedy justice, which serves the community as well as defendants;³³
- lawyers volunteering as conciliators to clear old lawsuits;³⁴
- judges volunteering without pay to be on-call after working hours to help resolve emergency legal situations;³⁵ and
- "Meet Your Judges" night in Western Massachusetts, organized by the bar association and the Supreme Judicial Court to improve the public's understanding of courts.³⁶

³¹ Ralph Ranalli, "A Meeting On, Rather Than In, the Court," *Boston Herald* (June 16, 1991).

³² *Id.*

³³ Paul Langner, "New Session Aiming to Lighten Overburdened Courts' Docket," *Boston Globe* (Aug. 1, 1991).

³⁴ Linda Hervieux, "Lawyers to Hear Cases, Cut Court Backlog," *Lowell Sun* (Sept. 12, 1990).

³⁵ Doris Wong, "State Judges Took Record Number of Crisis Calls After Hours Last Year," *Boston Globe* (Sept. 10, 1991).

³⁶ William Fosher, "W Mass Judges Meet Public, Offer Insights into System," *Springfield Union News* (May 5, 1991).

The task force also recognizes that people perceive the justice system from many different points of view. For example, court personnel who are doing their best under poor working conditions and insufficient resources have different perceptions than those people looking for redress.³⁷ People who come to the justice system often are in particularly vulnerable positions and perceive indifference, or worse downright hostility, by court personnel to their claims.

It is common, when describing problems of access to justice, to speak of "barriers" to justice: the Access to Justice Task Force was charged with examining "physical, geographical, economic, cultural, and procedural" barriers to justice.³⁸ The concept of barriers is useful; indeed, in our public hearings we heard testimony about how each of these factors barred individuals and groups from attaining (even sometimes from seeking) justice. However, we employ the concept of barriers with two important reservations.

First, as we stated above, in most cases a complex of factors, not any one, prevents people from attaining justice. Thus to isolate poverty as a barrier is misleading; while poverty is a huge barrier, it acts in combination with others (prejudice, lack of education, etc.) to multiply problems of access. Poor people are more vulnerable to other barriers than are people who are not poor. For example, geographical barriers (lack of public transportation to courthouses, location of courthouses along outmoded county lines) bar the poor because they lack the means to overcome them.

Our second reservation about the concept of barriers is perhaps more subtle. To state that certain barriers exist implies that achieving access to justice is simply a matter of removing barriers. This suggests, in turn, that the justice system was designed to provide justice to all equally and well, but somehow

³⁷ Consider the effect that serious budget cuts and a hiring freeze have had on current working conditions. Judge Paul McGill (Roxbury public hearing) testified:

There has got to be enough staff for services. It is so frustrating; I don't know how many people here have ever tried to go into a court that you're unfamiliar with . . . and walked up to a desk and tried to get someone to help you when the staff . . . get called away and you're standing there.

³⁸ "Fact Sheet," Chief Justice's Commission on the Future of the Courts. Compare Cappelletti and Garth, *supra* note 12, 10-20 (using "barriers" terminology and identifying the "costs of litigation" and "party capability" as two principal barriers).

these barriers, like logs, have been thrown across its doors. This image of the justice system is false. It was not constructed to provide equal justice to all.³⁹ The barriers are structural; "removing" them will mean redesigning the house of justice. Bearing these two reservations in mind, we describe several barriers that prevent access to justice.

II. THE JUSTICE SYSTEM DOES NOT TREAT POOR AND RICH ALIKE: ECONOMIC BARRIERS

This court once had a great tradition: "All men and women are entitled to their day in court." That guarantee has now been conditioned on monetary worth. It now will read: "All men and women are entitled to their day in court only if they have the means and the money."⁴⁰

A. The Poor's Inability to Secure Legal Representation

The justice system depends on attorneys but does not ensure that people with legal needs have attorneys; poor people suffer as a result. The functioning of our court system depends on the presence of lawyers. Litigants need counsel, and the system

³⁹ For one such view, see Lois G. Forer, *Money and Justice: Who Owns the Courts?* (New York: W.W. Norton, 1984) 15:

Our legal system's ancestry can be traced back some 800 years. Many of the practices prevalent today long antedate the Constitution of the United States and the egalitarian principles that influenced the Founding Fathers. Until the twentieth century, Anglo-American civil courts dealt principally with property rights. There was little concern for intangible rights and injuries or for the problems of people who had no property. In criminal courts poor defendants were tried, convicted, sentenced, and executed without representation by counsel. Under this centuries-old system, the courts were in the main available only to those who could afford to use them.

⁴⁰ *In re Michael Sindram*, 111 S. Ct. 596 (1991), (Marshall, J., dissenting), (waiver of filing fees for the poor). Ethan Bronner, "Justices Regulate Fee Waiver for Poor," *Boston Globe* (April 30, 1991).

requires that litigants be represented by counsel.⁴¹ Nonetheless, many people use the court system without a lawyer, most of them simply because they are too poor to afford one. Thus "poor" refers to anyone who faces economic barriers. The justice system does very little to provide the poor with lawyers. Although the system depends upon the presence of lawyers, it does nothing to ensure that people with legal needs have lawyers.

Litigants need lawyers. A lawyer listens to a person's story, translates that story into the language of the law, and communicates with the judge or other dispute-resolving officials on that person's behalf. At the same time, the lawyer "translates" the legal proceedings to the litigant and in a myriad of ways represents the litigant in judicial proceedings.⁴² Lawyers are aptly named "advocates"; they advocate the litigant's cause. In doing so, they shepherd litigants through an often bewildering maze of proceedings.

The importance to a litigant of a (competent) lawyer is difficult to exaggerate. In many cases the presence of a lawyer means the difference between winning and losing. And losing can have devastating effects on the course of an individual's life:

On their face, our laws apply equally to the wealthy and the poor. But, as everyone knows, laws mean little without a lawyer. And lawyers are expensive Much of the middle class cannot afford adequate legal assistance, and the poor, until very recently in our history, have been shut out almost entirely.⁴³

In a recent study of housing courts, the American Civil Liberties Union reported that nationally 71% to 80% of landlords are represented by lawyers in housing court proceedings, compared

⁴¹ While there are some dispute-resolving mechanisms in the justice system that do not call for litigants to be represented by counsel (mediation, for example), these are at present scarce. Moreover many such mechanisms are distorted because, while the mechanism is intended to work without lawyers (e.g., mediation), the more powerful litigant often employs a lawyer anyway.

⁴² See generally John M. Conley and William M. O'Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (Chicago: Univ. of Chicago Press, 1990). See also Sarat and Felsteiner, "Law and Strategy in the Divorce Lawyer's Office," *Law and Society Review*, Vol. 20, No. 1.

⁴³ Loren Siegal and David Landau, *No Justice for the Poor: How Cutbacks Are Destroying Legal Services* (ACLU, 1983) 1.

with only 5% to 10% of tenants who are represented by lawyers.⁴⁴ Further, in the New York housing courts, there are about 28,000 evictions a year, and over one-third of the families evicted end up in New York's homeless shelters.⁴⁵

The justice system needs lawyers. Litigants who appear in court without a lawyer ("pro se") cause enormous problems for the court system. Judges depend upon lawyers to communicate a litigant's case succinctly, to place it in legal language, and to explain to litigants the significance of procedures and requirements. Without lawyers to perform these essential functions, judges are called upon to perform them or they are simply not communicated. This impedes justice.

Our system's model of justice calls for judges to be passive and neutral. The premise for this role is that truth (and therefore justice) will emerge when each party puts its case forward and that both parties are competent to do so. This premise has no foundation when only one party is represented by counsel. The party with counsel generally has an overwhelming advantage. As a result, in pro se cases the judge faces an unattractive choice: either abandon the traditional role and help the litigant make his or her case or preside over a proceeding that lacks fairness.

The vast numbers of people with legal needs have no lawyers to represent them. The number of pro se litigants in the Massachusetts courts is high and rising. These pro se litigants are (1) people who cannot afford to hire a lawyer, (2) people who could afford a lawyer but do not realize the importance of hiring one, or (3) people with "small stakes" claims for which it is uneconomic to hire a lawyer because the fees are high relative to the amount of the claim.⁴⁶ While people in the first and third categories comprise many of the pro se litigants in the courts, many of these same people never make it to the courts. Of all three categories, the most important by far is the first.

A 1987 study of the legal needs of the poor in Massachusetts revealed that only 15%, or one in six, of their civil legal needs were being met.⁴⁷ There were, as of 1987, more than 760,000 poor

⁴⁴ *Justice Evicted*, supra note 11, ii.

⁴⁵ *Id.* at ii, 23-24.

⁴⁶ See Singsen, "Competition in Personal Legal Services," *Georgetown Journal of Legal Ethics*, Vol 2., No. 1 (Summer 1988).

⁴⁷ Massachusetts Legal Assistance Corporation, *Massachusetts Legal Services Plan for Action* (Nov. 1987) 1 and 3.

people in the Commonwealth.⁴⁸ This study considered all of the government and privately funded legal services for the poor. These unmet legal needs include housing (including evictions), family law, receipt of public assistance, and other essential areas. Similar studies in other states (New York, Ohio, Illinois, and Maine) and a nationwide pilot study of unmet civil legal needs have yielded similar findings.⁴⁹ The Maine study emphasized the bitter irony behind the poor's inability to secure legal representation: the poor are more in need of legal help than the non-poor yet they are less able to obtain that help.⁵⁰

⁴⁸ A "poor person" is someone with an income at or below 125% of the poverty line in the United States, which as of early 1992 is \$16,750 annually for a family of four. At or below 125% of the poverty line, people become entitled to free civil legal services in Massachusetts.

⁴⁹ See *Illinois Legal Needs Study: Plan for Action* (Chicago, July 1989) 1, 133 (only 20% of the civil legal needs of the poor are being met); *Report of the Maine Commission on Legal Needs: An Action Plan for the 1990's -- Executive Summary* (May 1990) 4 (representation is available for only 23% of the legal needs of the poor); *Ohio Legal Needs Study, Final Report, Vol. 1* (prepared by the Spangenberg Group, June 1991) i (only 17% of legal needs addressed); *New York Legal Needs Study, Final Report* (prepared by the Spangenberg Group, June 1990) 199 (not more than 14% of the civil legal needs of the poor are being addressed); and "American Bar Association National Civil Legal Needs Survey" in *Consortium on Legal Services and the Public, ABA, Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and of the Public Generally* (ABA, 1989) 4 (only 20% of the legal needs of the poor -- an approximate figure -- are being addressed).

⁵⁰ Fundamental to access to the responsibilities and rewards of society is access to justice. This basic promise of our social order is critical for the poor, because the vicious cycle of poverty is enmeshed in a tangle of law and regulation which others rarely confront. The poor face their fellow citizens in eviction proceedings, utility shut-offs, repossessions of credit purchases, and suits on unpaid bills. They face their own family members in violent disputes and crises often engendered by the very conditions in which they live. And they face, always, "the System," the welfare agencies which disburse the income maintenance, housing, medical, and other benefits which society provides to alleviate the lot of the poor. [Emphasis added.]

B. Other Ways the Poor Suffer in the Justice System

A complex of factors, as we indicated above, not any one, denies people access to justice. Nowhere is this more apparent than in the case of the poor. Poor people, because they are poor, are more vulnerable to various barriers the system erects: legal language and procedures mystify the poor all the more because they cannot hire lawyers to explain, and often the poor lack education to understand what is happening without a lawyer's assistance. Inefficient scheduling and repeated continuances create high expenditures and therefore hurt the working poor especially hard because each day's pay is so essential. Geographical barriers are hard to overcome because the poor often do not have cars. These are only a few of many such examples.

Not only do the poor lack the means to overcome many barriers in the courts, they are disproportionately represented in groups that face specific additional barriers. The poor are often members of minority groups or recent immigrants from Asia, Africa, Latin America, or other non-Western (or non-English-speaking) countries. They comprise many of the elderly and the physically and mentally disabled. Each of these groups faces its own barriers to justice; they face prejudice, cultural and linguistic, and physical barriers. In the case of the poor, these barriers accumulate and compound those poverty has placed before them.

III. THE JUSTICE SYSTEM DOES NOT ADEQUATELY RECOGNIZE OR RESPECT THE DIVERSITY OF THE PUBLIC IT SERVES: CULTURAL AND LINGUISTIC BARRIERS

The Commonwealth is made up of people from a wide variety of cultures and ethnicities. This has historically been the case, it is the case today, and it will be the case in the future.⁵¹ As a vivid example, in a five-and-a-half-month period in 1988, 1,504 people appeared in criminal matters before a single judge in Roxbury District Court. Of these people, just over 80% were North American: they were African-American, Caucasian American, American-born Hispanics, American-born Cape Verdean, Canadian-born blacks, Caucasian Quebequois. Slightly over 10.5% were from Central and Latin America: they were Puerto Rican, Cuban, Honduran, Colombian, Panamanian, Guatemalan, Venezuelan, Peruvian, Costa Rican, Salvadoran, Mexican, and Argentine. Nearly 6% were Caribbean: they were from the Dominican Republic,

Report of the Maine Commission on Legal Needs, supra note 49, 2.

⁵¹ Futurists predict that "minority" populations will continue to increase into the next century. See discussion *infra* at 33.

Jamaica, Haiti, Barbados, Trinidad, West Indies (exact locale unknown), and the Virgin Islands. Slightly over 1% were Portuguese-speaking and were either Cape Verdean, Brazilian, or Portuguese. Nearly 1% were from Africa: they were from Nigeria, Morocco, Ethiopia, Senegal, Tanzania, Sierra Leone, and the Sudan. Others present in small percentages were Europeans (from Russia, Germany, including German-born blacks, Greece, Italy, and Turkey); Asians (from Korea, China, and Vietnam); Middle Easterners (from Iran and Iraq); and South Pacific Islanders (from the Philippines).⁵²

Despite this diversity, our justice system has its roots in the culture and tradition of one group, the historically powerful Anglo-Americans. This one group has fashioned the rules and processes whereby many of the deepest social and personal conflicts within and among the people of different cultural and ethnic groups must be adjudicated. While it may be possible to conceive of a system designed by a few and applicable to all, the exclusion of many, for the most part, leads to injustice. Thus, we focus on barriers to justice for people who are not a part of the historically powerful group. One obvious barrier is language; other less obvious barriers are cultural.⁵³

For example, the way to tell a story or recount an event in certain cultures is circular. People accustomed to a linear exposition may find this circular rendition evasive when, in fact, it is not so intended. Therefore differences in customs and mannerisms are inherent barriers.

Additionally when a proceeding requires a language interpreter, delay often results when one is not available in a timely fashion:

[Y]ou have a number of people who are brought before you, and you have to continue them. . . . The only reason is because nobody can understand what they are saying. They must definitely be mystified as to what's

⁵² See written submission from Judge Gordon A. Martin, Jr., who listed the ethnicity of each of the 1,504 people who appeared before him in criminal matters in Roxbury District Court between July 18 and December 29, 1988. Judge Martin notes that some of these criminal matters were relatively minor (abandoned automobiles and violations of the Commonwealth's automobile and insurance laws). These 1,504 people come from 41 countries, including the United States.

⁵³ See Deborah Woo, "The People v. Fumiko Kimura: But Which People?" *International Journal of the Sociology of Law*, Vol. 17, 403-428 (discussing linguistic issues and a "cultural defense").

going on. Yet you try to get, say, a Haitian interpreter. You'd be lucky to get one a couple of days down the road, let alone one you need right then and there.⁵⁴

Interpreters are hard to come by. A common assumption that anyone who speaks two languages can interpret in court is erroneous.⁵⁵ One speaker stated:

. . . the language issue doesn't mean bringing in a probation officer who is bilingual and sits there and has a dialogue with the judge and sort of explains it to the [individual] and then explains that answer back to the judge. That is not translation."⁵⁶

Court interpreters have specialized skills; they must translate with neutrality and thoroughness. Such interpreters must be available to those who need them.

To break down cultural and linguistic barriers the task force recommends that court personnel and judges reflect the diversity of the Massachusetts population. A Springfield Hispanic community member testified:

I personally have not seen judges, except one, who speak my language or understand who I am. I don't know where they live, and I don't know what they feel about me.⁵⁷

IV. THE JUSTICE SYSTEM IS DEAF TO THE CRIES OF CHILDREN: BARRIERS AGAINST CHILDREN

If we do not involve our kids in our judicial system . . . we've lost a generation in some ways. And that generation is going to raise the next generation. Somehow between now and the year 2020, we must intercede, we must make our children feel that this is

⁵⁴ Judge Gordon Martin, Roxbury public hearing.

⁵⁵ National Center for State Courts, Information Service, *Report on Trends in the State Courts* (July 1991) at 4.

⁵⁶ Tom Barbieri, Director, Merrimac Valley Legal Services, Lowell public hearing.

⁵⁷ Carlos Gonzales, Springfield public hearing.

where they should come for justice, that they don't have to deal out justice on the streets.⁵⁸

Family problems, particularly those involving children, pose unique and urgent problems for the justice system. Consider the testimony of Marie Matava, former Commissioner of the Department of Social Services:

Right now our caseload is characterized by mothers 25 to 30 years old who have three to four year children, who are involved with poly drug use and alcohol, who have abusive and assaultive male relationships, and who are often pregnant with another child. And that is the sort of family scene we are looking at right now where we are involved with enormously difficult issues around care and protection. . . . Neglect takes on mammoth proportions. No food in the refrigerator. No jackets on kids. No medical caretaking of the children. Complicated by a boyfriend (sometimes a father) who is providing the drugs for mother, having mother prostitute in order to get the drugs, is trafficking drugs in the house, and has a history of violence.⁵⁹

Two issues are raised: first, courts need to make accommodations for children (and litigants with young children). Second, courts must understand that more and more children, reflecting the complexity of domestic life today, are not products of a traditional family. Another witness pointed out that court delay and decisions especially affect a child's life. Children are also often "the most unrepresented" and therefore the most vulnerable.

V. EMPHASIZING THE FUNDAMENTAL "SAMENESS" OF ALL PEOPLE WHILE RECOGNIZING SPECIAL NEEDS: BARRIERS AGAINST THE ELDERLY AND THE PHYSICALLY AND MENTALLY "DISABLED"

Inaccessible justice is justice denied, especially for the elderly and persons with disabilities.⁶⁰

⁵⁸ Leslie Harris, Roxbury public hearing.

⁵⁹ Springfield public hearing.

⁶⁰ American Bar Association, *Court-Related Needs of the Elderly and Persons with Disabilities: A Blueprint for the Future* (1991).

The Massachusetts Constitution was amended in 1980 to protect the rights of the Commonwealth's handicapped.⁶¹ "Handicapped" generally refers to people who have a physical or mental impairment that substantially limits one or more major life activities.⁶² The federal American with Disabilities Act, effective in January 1992, also prohibits discrimination against disabled individuals in employment and in state government services, among others.⁶³ Title II of the act requires court managers and judges to examine how services, programs and activities are delivered and to affirmatively accomodate qualified disabled persons who participate in the court system as employees, litigants, victims, witnesses, jurors, and attorneys.⁶⁴

The task force acknowledges the particular needs of blind and deaf people who seek to obtain justice. Massachusetts currently has more than 30,000 residents who are legally blind and more than 40,000 who are completely deaf.⁶⁵ To address the needs of the elderly and the disabled more efficiently, the task force believes better scheduling and less delay is needed to minimize the costs of "waiting time" for interpreters. Training is also needed to enable court personnel to meet the needs of the disabled public. In addition, technology can increase communication access:

In realtime reporting, so called, the court reporter's stenograph machine is connected to a computer, the notes are translated instantaneously, and the words appear on computer screens within about five seconds after having been spoken.⁶⁶

⁶¹ Article 114 of the Amendments to the Massachusetts Constitution reads in its entirety: "No otherwise qualified handicapped individual shall, solely by reason of his [sic] handicap be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the Commonwealth."

⁶² Exec. Order No. 246, 442 Mass. Reg. 93 (1984).

⁶³ Pub. L. No. 101-336, enacted July 26, 1990.

⁶⁴ NCSC, *Report on Trends*, *supra* note 54, at 9.

⁶⁵ Thomas Palmer, "Overcoming Obstacles," *Boston Globe* (June 27, 1991).

⁶⁶ Letter from Eugenie H. Fitzhugh, President, Mass. Shorthand Reporters Association, dated February 21, 1991.

During two hours of direct and cross-examination, Mr. W [who is deaf] testified fully in his own voice after reading the questions and other proceedings on the computer screen we had placed on the witness stand. He used the system adeptly without any prior training or practice.⁶⁷

The task force is also concerned about changing court facilities to help the disabled literally "reach the courthouse doors." Here the concept of "barriers" is most appropriate; improvements in access for wheelchair-bound people and others with mobility impairments must be incorporated into renovations. A task force member attended a national conference in February 1991 on the court-related needs of the elderly and disabled. The preamble of this group's recommendations states in part:

The justice system should commit itself to the removal of attitudinal barriers and serve as a model of accessibility based on the principle of "universal design," which requires a barrier-free and technologically enhanced environment in which what is needed by one is available to all. Federal, state, local, and private funders should provide sufficient resources to ensure that this model is achieved.⁶⁸

The task force also heard from advocates for the mentally disabled, who have problems participating fully in the judicial process. These advocates believe judges do "not take seriously the rights of the mentally ill" and attorneys are "unable to provide the representation that their clients are entitled to."⁶⁹ As opposed to the traditional request for more ramps or interpreters, an alternative approach was suggested:

By adopting models of personhood and decisionmaking methodologies which do not demand conformity to the tradition of able-bodied competent persons, the judicial system can expand its access to persons with mental limitations and focus on their sameness rather than highlighting their difference."⁷⁰

⁶⁷ Frank O. Nelson, "A Real Time Case History," *National Shorthand Reporter* (May 1989) 22.

⁶⁸ ABA, *Court-Related Needs*, *supra* note 60.

⁶⁹ Stan Goldman, Executive Director, Mental Health Legal Advisor's Committee, Boston public hearing.

⁷⁰ Letter from Steven J. Schwartz, Center for Public Representation (Mental Health Protection & Advocacy Project, Disability Law Clinic), Northampton, MA, dated Dec. 18, 1990.

VI. THE JUSTICE SYSTEM INCORPORATES SOCIETY'S PREJUDICES AGAINST PEOPLE WHO ARE NOT MEMBERS OF TRADITIONALLY POWERFUL GROUPS: BARRIERS OF PREJUDICE

Tribal members believed that they were getting their day in court not because of the legal merits of their case, but rather because they stood out (as do most Indian Tribes) as an embarrassing reminder to the legal system that "equal justice for all" is a myth.⁷¹

Some segments of the population are reluctant to come to the courts or come fearful that they will be mistreated. . . . In some cases, such as with battered women, this perception is an accurate reflection of the treatment. . . .⁷²

An issue that greatly concerns the task force is the unwelcoming atmosphere that certain groups feel when entering the courthouse door. This "official rudeness" makes these, for the most part non-Caucasian, groups feel like they are not supposed to be in court. This lack of belonging is not conducive to obtaining justice from the system. Although theoretically a place to receive equal treatment, the courts suffer from bias against women and racial, ethnic, and minority groups, in addition to prejudice against the economically disadvantaged and disabled that we have already discussed. Issues of bias are inevitably and inherently connected with court procedure and administration.

Specific data are being gathered on bias against people of color in the Massachusetts court system and legal profession.⁷³

⁷¹ Margot Kempers, "There's Losing and Winning: Ironies of the Maine Indian Land Claim," *Legal Studies Forum*, Vol. XII, No. 3 (1989) 267, at 283.

⁷² Letter from Gladys Maged, Director, Committee for Gender Equality, dated April 25, 1990.

⁷³ The Supreme Judicial Court has established the Commission to Study Racial and Ethnic Bias in the Courts (whose report is expected in 1993) and the Committee for Gender Equality (which is implementing results of the Gender Bias Study, published in 1989). To supplement our own task force's firsthand information on these topics, we incorporate these sources for more detailed information and recommendations on how to achieve bias-free behavior in the courts and bias-free treatment in substantive law matters.

Other states have found that bias exists in such areas as legal representation, prosecutorial discretion, monetary damage awards in civil cases, courtroom treatment, court personnel hiring, and jury selection and possibly exists in cross-racial eyewitness identification, minority passage of the bar exam, and physical conditions of courts.⁷⁴

VII. THE JUSTICE SYSTEM DOES LITTLE TO AMELIORATE THE FEELING OF HELPLESSNESS OF CRIME VICTIMS AND THEIR FAMILIES: BARRIERS AGAINST VICTIMS

Our son gets murdered. Now we start in with the court process. . . . There's a lot of avenues people are going down, but they're not taking us with them. . . . There's no sensitivity. . . . We have to sit there, go through the steps without having any type of input. . . . You have to stand in the same hallway with the murderer. . . . [T]here should have been someone from the court that would've had a system, an agenda, to tell you "This is where you're going. This is what's going to happen."⁷⁵

The task force heard extremely moving testimony from family members of crime victims. They feel the courts have not allowed them adequate opportunity to explain the impact crime has on them and to testify within the process.⁷⁶ They also are concerned that delay inhibits understanding that a consequence is associated with a crime.⁷⁷ Victims believe their special needs require court-based programs and procedures, particularly to resolve their desire to be involved in judicial proceedings. Victims and their survivors feel that the assistance agencies must take initiative in contacting and guiding them. A comprehensive victim (and witness) assistance program that is adequately funded and provides high-quality personal advocacy assistance is important.⁷⁸

⁷⁴ NCSC, *Report on Trends*, *supra* note 54, at 18.

⁷⁵ Paul Faucher, *supra* note 1.

⁷⁶ Vaughn Simkins, Violence Prevention Project, Boston public hearing.

⁷⁷ Written testimony of Katharine Perkins, Worcester Youth Guidance Center, dated Dec. 5, 1990.

⁷⁸ See ABA, *Court-Related Needs*, *supra* note 59, at 16.

PART THREE: CREATING THE FUTURE

I. ENVISIONING CHANGE

A. Key Trends and Their Effect on the Justice System

In 2020 there will be more adults with crack-addicted babies. . . . adults who suffer all kinds of complications associated with having [been] children of drug-addicted mothers. It will be a population that has known violence as a daily and intimate reality.⁷⁹

As for the future, I see a bunch of bodies lying on the street.⁸⁰

The task force heard from the public about the future they envisioned, as well as discussing trends the group felt would most affect society and the justice system. Some trends the task force identified are: an increase in nonwhite (currently labeled "minority") populations, an increase in cultural and ethnic diversity through immigration, an aging population, a growing gap between rich and poor, a growth in poverty, especially children in poverty, and failures of the educational system.

One consequence of a diverse populace could be an increase in intolerance and prejudice in general, which might mean more diversity-related conflicts (i.e., those based on culture, race, age, class) finding their way to court. There may be more disputes arising from expanding theories of rights and the establishment of new statutory rights.⁸¹ A more diverse populace, particularly due to increased immigration, will mean a projected increase (estimated to range from 8% to 13%)⁸² in the number of interpreted court appearances.

⁷⁹ Judge Maria Lopez, Chelsea District Court, Roxbury public hearing.

⁸⁰ A young woman in Boston, quoted in Deborah Prothrow-Stith, *Deadly Consequences: How Violence is Destroying Our Teenage Population and a Plan to Begin Solving the Problem* (New York: Harper Collins Publishers, 1991) 94.

⁸¹ National Institute of Dispute Resolution, "The 1990's" (Excerpts of Interviews, *Futures Project*, NIDR, 1990).

⁸² Virginia Benmaman, "English/Spanish Dictionary of Legal Terminology Developed for Use by Court Interpreters," *SJI News*, Vol. 3, Issue 1.

Technological developments will have positive and negative effects on society and the justice system. Technology could give governments greater ability to control or monitor the population. New technologies are already creating new social conflicts, such as surrogate parenthood and organ transplants. Technology can cut off or increase access to justice, depending on whether full access to technology is assured. An example of how technology could increase access is video links that would allow language translation to take place from remote locations.

An aging populace might mean more court involvement in determinations of capacity and surrogate decision making, for example, guardianship or "right to die" cases. Failures of the educational system affect the justice system, which must deal with illiterate participants. The children whose behavioral difficulties stem from their parents' drug addiction may place increasing demands on the judicial system.⁸³

The task force also anticipates an increase in the rate of social change. Changing societal values and standards, e.g., the nature of male and female roles and the number of single-parent families, takes a toll on children who have to deal with societal stress without traditional family support and structure.⁸⁴ Like other workplaces, the nature of work in the justice system may change due to technological advances that allow more work at home, the influence of a multicultural workforce, and the "feminization" of the workplace.

B. The Future We Most Want to Avoid

First, we want to avoid a future that replicates the structures and attitudes of the present. Second, in constructing the future we would want to live in and to bequeath to those who will follow us, we do not want to exacerbate society's deep divisions. We do not want, for example, to create a "two-track" system where one track is for the rich and powerful and the other track is for everybody else. Thus in recommending a variety of dispute-resolving mechanisms (see below at pp. 36-37), we must guard against any tendency for one mechanism (the traditional trial-type hearing, for example) to be utilized primarily by

⁸³ Letter from Ellen G. Slaney, Chief Probation Officer, Wrentham District Court, dated Dec. 19, 1990.

⁸⁴ Barbara Carton, "Divorce: What the Judge Sees," Boston Globe (May 22, 1991). This article profiling Probate and Family Court Judge Edward M. Ginsburg includes his observation: "It's awful. . . . The intangibles. What the future effect will be of all these broken families, I shudder to think."

people with high-paid lawyers and for other mechanisms (mediation, for example) to be the poor person's province.

II. CREATING THE FUTURE: THE JUSTICE SYSTEM

[T]he society of 2020 will not find acceptable a justice system based on procedures and traditions of two centuries past.⁸⁵

Who will pay for this access? And if open access is not available, how will we pay for not having open access?⁸⁶

At the outset of this report we sketched a vision of the justice system in 2020. In this vision the justice system leads society in the realization of certain deep social values -- the values of human dignity, mutual respect, and shared responsibility prominent among them. This section attempts to fill in the broad outlines of that vision. Here we describe the practical features of a justice system -- that is, the judicial component of a justice system -- that we believe would provide access and justice to all members of society. As we stated earlier, the future is not technological. It is political. Achieving the measures that we describe here is less a matter of invention than of will.

A. Changes in the Court System

1. COURT ORGANIZATION

In 2020 the judiciary will have an open, flexible, and multifaceted structure. Its structure will allow it to be both responsive and "proactive." It will anticipate changes in society and will have processes in place to anticipate and respond to social change.

There will be a wide variety of forums available to resolve conflict. These different forums will be tailored to and available for resolving the different types of disputes that come before the courts.

⁸⁵ Charles Crawford, *supra* note 21.

⁸⁶ Marnie Warner, *supra* note 21.

Only a small subset of matters will be resolved through full-blown, adversary, trial-type hearings. Trials, with their important due process protections, will be employed mainly to resolve criminal cases (and only certain of these) and certain kinds of civil cases where an adversary forum is necessary and appropriate.

Major institutional litigation in which litigants challenge the practices of social institutions (hospitals, prisons, schools, labor unions, large corporations, etc.) will have their own forums. There will be public funding for lawyers in all major institutional disputes, i.e., those involving redistricting, school committee elections and jail litigation.

Mediation will be available to resolve personal disputes that arise within families, at work, and among small commercial enterprises. It will be tailored to situations in which both parties have roughly equal bargaining power and are in continuing relationships. We recognize that people in relationships with one another -- personal, commercial, or a mix of both -- frequently do not have the same level of bargaining power. However, there are some kinds of relationships in which people have more comparable bargaining power than in others. Two tenants in a dispute over noise are more likely to have comparable bargaining power than either tenant is likely to have in a dispute over noise with a landlord.

In conflicts where there typically is significant power differential between parties (landlord-tenant, consumer-utility, consumer-business entity, public benefit recipient-governmental entity, employee-employer, and others), a kind of assisted mediation will be available. The party lacking real bargaining power will be assisted by a lawyer or other advocate. The court will help this party obtain assistance; it will help her or him locate an appropriate advocate and, if necessary, will ensure that the party is supplied with a qualified, able advocate without charge or with a charge tailored to ability to pay.⁸⁷

Community-wide mediation and conflict resolution will be available to deal with patterns of violence, persistent prejudice, or other divisive social ills. While the precise nature of these forums need elaboration, the judiciary will play an important role in bringing about justice on a community-wide basis. Court personnel will solicit the views and perceptions of people in a community, convene meetings under the auspices of the

⁸⁷ See *infra* Section B, "Changes in the Delivery of Legal Services," which describes the varieties of ways in which the justice system will supply -- and pay for -- advocates to those who need them but cannot find or pay for them.

court for discussions among community members (all interested members, not simply community leaders), and aid the community in fashioning solutions to persistent problems.

The justice system will have certain **specialized courts** (or divisions within courts) to handle matters in certain specified areas of the law. Two such courts (or divisions) will be the **family court and the housing court**. These courts will employ personnel with special expertise, interest, talent, and experience in the legal, social, economic, and psychological aspects of disputes that arise in these particular areas. This familiarity with the contours of the problems that individuals experience in these vital areas will enable court personnel to help bring about more lasting and more meaningful resolutions of disputes. The family court will employ multidisciplinary teams of social service workers, psychologists, education counselors, and others. It will be adequately equipped to handle the problems of children. Children with serious matters before the court will be represented by their own advocate. The court will arrange for the child's parent or guardian to pay for the child's advocate and if they are unable to pay will arrange for an advocate free of charge.

Among the other forums available will be: arbitration, private judges, computer-assisted judging and other technologically assisted hearings between people in different locations.

The justice system should have many different forums available for resolving different types of disputes; each will be accessible through a "multidoor" comprehensive justice center with personnel to greet and guide potential litigants. Located in large communities with satellites in smaller communities (essentially ombudspersons who can have access to the resources of the comprehensive center through advanced information and communications technology), these justice centers will be places for members of the public to go to resolve disputes.

A key feature of these justice centers will be the personnel who greet potential litigants and guide them through the center's facilities and services. These personnel, who are trained to be particularly sensitive, will listen to a potential litigant (or her representative) describe the conflict, make a preliminary assessment and recommend (or in some cases direct the party to) the appropriate forum for resolution.⁸⁸ These same personnel

⁸⁸ Hence the term multidoor; upon entering the justice center, there will be a variety of "doors" through which the potential litigant can go, and there will be court personnel employed to help the litigant determine which door is best for her.

will also provide parties with referrals to attorneys and other advocates; this will include referrals to free or reduced-fee advocates.

In addition to judicial services, this comprehensive justice center will be a place where the public can obtain administrative and other services. Hearings on public benefits, license applications (of all kinds), zoning board decisions and the like will be conducted under the auspices of this comprehensive justice center. Neighborhood councils can convene their meetings in the center. Meetings for the public to offer their views on the suitability of proposed judicial personnel will take place at the center. The comprehensive justice center will be a place where people can obtain a variety of public services and information about still others.

An intermediate court of appeals and a Supreme Judicial Court for resolving questions of law will remain in place, in addition to first-level courts and other forums for dispute resolution. The concept and function of appellate courts will remain essentially as they are now. Areas of change will include a more diverse composition of the appellate judiciary and broader public dispersal of judicial opinions (and understandable summaries of opinions) as outlined elsewhere in this report.

Courts will build partnerships with other major social institutions: schools, universities, hospitals, banks, businesses and others. These partnerships will have at least two major purposes: (1) the use of the expertise and resources of these other institutions to aid the courts in the delivery of justice and (2) educating those other institutions in the processes (and problems) of the judiciary (thereby improving the work that these other institutions can do for the courts and can do for the larger processes of justice in society).

As an example, private institutions that use and develop information technology should develop systems customized for the courts. As another example, people training in the professions (medicine, psychology, management, etc.) could fulfill training requirements by working in the courts.⁸⁹

Some ideas for linkages between schools and the courts are outlined in section III. A., *infra* at p. 50 et seq.

⁸⁹ Mary DiFrancisco, First Assistant Registrar, Essex County, testified: "Courts could develop a program to utilize the expertise in universities and training institutes in the area; people in graduate training could do "externships" with the court or could contribute while training in others ways." Lowell public hearing.

The courts will have in place a variety of mechanisms (focus groups, advisory committees, community review panels, a public standing commission on access, an annual conference on the future of the courts, and others) whereby court users (members of the public), legal providers, and court personnel engage in an ongoing critique and revision of rules, practices, and procedures in the courts. These may include weekend and evening sessions in comprehensive justice centers where members of the public discuss reactions to recent decisions, recurring cases, and other developments in the law, and a means for cycling this public discussion back into the development of the law.

Members of jury pools could be used as sources of information about the public's perception of the justice system and needs and solutions for change. Community review panels could be established with revolving membership to receive compliments and complaints about court procedures and personnel and to consult with judges on court operations. There should be a standing commission on access issues; the members of this commission should be from within and outside the justice system and should serve overlapping but finite terms. There should be an annual working conference on the future of the courts at which people within and outside the court system chart the system's voyage into the future.

2. COURT FACILITIES

Court facilities will be clean, bright, and attractive. They will be aesthetic and appropriate to the job of justice. Their architecture will reveal them to be public spaces, where valued and shared activities occur. Public buildings will have high ceilings, clean walls and floors, beautiful light, art and sculpture (from the many cultures that comprise the Commonwealth), poems and pieces of history (of our society's best hours and its worst) to contemplate, and other features appropriate to the house of justice. Public buildings will not be, as they are often today, drab, unclean, ill-lit, poorly maintained facilities. Facilities are currently so outdated that juveniles and female prisoners have been chained to chairs in the courtroom because they cannot be held in the same area as male adult prisoners, and no other holding area was available.⁹⁰

Court facilities will meet "universal design" standards. Unlike the facilities of today that, for the most part, were built to "accomodate the 'normal' person" -- a healthy adult male

⁹⁰ Bill Dermody, "New Holding Area Can Speed Caseload," *Gloucester Daily News* (Aug. 4, 1990).

who is right-handed and about 30 years old,"⁹¹ the facilities of 2020 will accomodate everyone. This will be achieved through the universal design concept, which "goes beyond traditional notions of accessibility to target all people of all ages, sizes, and abilities."⁹² Universal design principles must be applied throughout the courthouse or comprehensive justice center; areas that may need redesign include parking space, exterior steps, heavy doors, security gates, interior stairs, floors (too slippery, changes of level, etc.), restrooms, counters, narrow hallways, water fountains, public telephones, cafeterias, waiting rooms, law libraries, judge's bench, jury box and jury room, witness box, counsel tables, public courtroom seating, microphones, acoustics, and lighting.⁹³ The court facilities of 2020 will be equipped with the following features.

There will be information booths or reception desks at the entrances of each of the courthouses and comprehensive justice centers in the Commonwealth. These booths will be staffed by multilingual personnel who will welcome court users. The booths will contain simple-to-use computers, interactive video screens, and other technologies to provide information to and to direct court users. These machines will operate in a wide variety of languages (as necessary, given the particular community, and in a large urban community like Boston, a very wide variety).

There will be clear, well-marked, multilingual, easy-to-read signs in all necessary languages throughout all the physical facilities of the courts.

All courthouses will provide daycare facilities staffed by high-quality, trained personnel. These facilities will be clean, bright, cheerful, and equipped for babies and will provide toys, games, books, educational computer programs, and story readers (often members of the community, retired elderly and others). Parties with child-care responsibilities can bring their children with them to court, leave them with confidence at the daycare facility, and proceed to their court session.

⁹¹ ABA, *Court-Related Needs*, *supra* note 60.

⁹² *Id.* at 49. "Consider a concept where the user is not known, but every possibility is accomodated. The architect is not pregnant today, but she may become so. . . . The designer may not be in a wheelchair today, but tomorrow could be in a car accident. . . . Why not plan for every possibility so the environment can be convenient, functional and efficient [for all]?" *Id.* (citing Harkness and Groom, *Building Without Barriers for the Disabled* (1976) 5).

⁹³ *Id.* at 45-46.

Each courthouse or comprehensive justice center will have a cafeteria. Here people can wait, meet, and have a meal. A paging system will ensure persons will not miss participating in proceedings. Food will be nutritious and appetizing and prices will be reasonable (and there will be subsidized prices where necessary, modeled on school lunch programs).

Many court services will be available on evenings and weekends. There will be expanded hours of operation for court activities, including hearings, to better serve the public's needs and emergencies, especially working people who cannot easily make weekday appearances.⁹⁴ Some services will be available at all times (information, scheduling, referrals, etc.) by telephone or electronically through a system similar to airline information and scheduling systems.

In criminal cases there will be separate waiting areas for defendants and their families and for victims and their families. Defendants will be escorted through the system by their attorneys or other advocates; victims and victims' families will be escorted through the process by victim services personnel employed by or through the court.

Efficient, clean, and inexpensive transportation services will be available to all courthouses and justice centers during all hours of operation. Because many barriers to access are connected to transportation problems, if general public transportation services are unavailable and unfeasible, the court will arrange for services between court facilities and major public transportation centers. Home pick-up will be available for people for whom no other alternative is available. All transportation will accomodate the needs of the elderly and the "disabled."

3. COURT PROCESSES AND SERVICES

Under the centuries-old model, a court performs its function with basically a judge, a pair of lawyers, and 12 citizens impaneled as a jury. To a surprising extent, this is still the way courts operate today. In 2020, however, the courts will operate differently and will provide a variety of services not contemplated by the historical model. Some of the services courts will provide in 2020 will enhance the court's ability to perform better the role they contemplated for themselves under this old and traditional model (one such service will be to provide interpreters so that litigants can better participate in their

⁹⁴ Letter from Mary J. Farinelli to Gov. William Weld, dated June 27, 1991, strongly encouraging Saturday court dates. (Referred from the Executive Secretariat to the Chief Justice.)

own proceedings). Other services will reflect 2020's changed views of the purpose and function of court proceedings (prominent among these will be an extensive network of referrals to social service programs and follow-up activities in the courts).

Each court and justice center will be fully staffed with linguistic and cultural interpreters. In 2020 courts and justice centers will be staffed with sensitive, skilled personnel trained to interpret for all groups within a community who hail from non-English-speaking cultures and who have not learned to speak English. This will mean interpreters familiar with Hispanic, Asian, African, Caribbean, and other cultures and languages. There will also be interpreters trained in American Sign Language for the deaf and hearing-impaired.

Accurate interpretation of the legal process is critical for people who do not speak or understand English, including victims, defendants, and witnesses, for assuring equal access to due process and the administration of justice.⁹⁵ Interpreters will be trained in both the language and culture of the people for whom they are translating and in the language and culture of the law. It is helpful for court interpreters to command fully two languages and also to know about courtroom procedures and legal vocabulary.⁹⁶ This will enable the interpreters to translate both the words and their meaning for the litigants and the court personnel. We welcome and endorse the recommendation of the Cambodian Mutual Assistance Association:

[I]n communities with a significant Cambodian population the Courts [should] provide an advocate^[97] who is culturally and linguistically qualified to walk people through the system to ensure that procedures are understood and that people's rights are protected.⁹⁸

Scheduling practices of 2020 will ensure that interpreters will be on hand when needed, and proceedings will not need to be

⁹⁵ Benmaman, *supra* note 82.

⁹⁶ NCSC, *Report on Trends*, *supra* note 54, at 4.

⁹⁷ We do not believe, however, that the interpreter should be an advocate in the traditional sense, i.e., a lawyer.

⁹⁸ Written submission of oral testimony, Ravuth Yin, Cambodian Mutual Assistance Association of Greater Lowell, Inc., dated November 12, 1990. However, interpreters will be not be free to "explain" the proceedings to the litigant; the interpreter's job will be to facilitate communication between litigants and court personnel and not to act as an intermediary between them.

postponed for lack of an available interpreter. Lastly, the services of human interpreters will be supplemented with technological devices.

Courts will have computer-assisted scheduling systems. Repeated delays and rescheduling of trials constitute a serious barrier to justice for working people and those who must make provisions for the care of children, aged or infirm persons. These barriers are compounded when, as in some courts at present, trials are scheduled for an hour one day, two hours a later day, and so forth. Use of computer-assisted scheduling systems will help to ensure that cases will not be unexpectedly postponed or delayed and that all persons necessary for a proceeding will be present when that proceeding is called to order. These computerized scheduling systems will be accessible by telephone and electronically 24 hours a day and will be as sophisticated as any private sector airline scheduling system (or any other high-volume, complex scheduling system).

Social services will be available within the courts or by court referral to social service programs outside the courts. In 2020 the justice system will acknowledge that many of the cases that come to the courts are difficult to cast as "legal problems" susceptible of "legal" solutions. Rather, the system will properly understand such cases as complex human problems with social and personal dimensions that cannot be resolved simply by a judicial decree of rights and responsibilities. The courts will recognize that what people need in these cases typically is a variety of social services, including psychological counseling and therapy, placement in education and training programs, parenting training, "Big Brother" and "Big Sister" programs, mentor programs, substance abuse counseling, and programs for elderly and handicapped "shut-ins."

In 2020 the courts will treat these cases as the kind of social and personal problems they are and will manage a problem-solving process for them. Personnel will have the information and the ability to refer litigants and potential litigants to a wide variety of social service programs at any and all stages in legal proceedings. The programs to which courts will refer people will be both "public" and "private." There will be a large number of private and joint public-private initiatives to provide these kinds of services. Personnel will undertake follow-up activities on referrals.

In addition to making referrals, the courts will be equipped to provide some social services on an emergency basis. Psychologists and other counselors will be employed by the courts to help people when referrals cannot be accomplished quickly enough and in other emergencies. One way to ensure that such personnel are available in courts will be through partnerships with training institutions, hospitals, and universities.

The court will provide litigant advocates for certain kinds of parties. For example, in a domestic abuse or other case in which a person is in a precarious, vulnerable position and is without her or his own advocate, a court-supplied litigant advocate will guide the individual through the court procedures. The litigant advocate will solicit the concerns of the individual and explain to him or her what to expect from court proceedings.

The courts will provide simplified forms, information and do-it-yourself packets, and computerized instruction programs. The court will have undertaken a major effort to overhaul all legal forms; the new forms will be simple, straightforward and written in a non-technical style. They will also be available in plain English, Espana Clara, and in a variety of languages and always in simple terms.

Through the use of interactive video and computer programs all will have access. Courts will work to ensure public access for those who otherwise do not have use of computers and will also provide speech recognition technology (which allows text creation and control programs by voice instead of by typing) to ensure computer access for individuals with disabilities. Computerized instruction programs (also multilingual and also in plain, direct language) will be available on computers for public usage in the courts, justice centers, and libraries; they will also be accessible electronically (on home computers) and from telephones anywhere, at home, in service facilities, and elsewhere. These instruction programs will accompany information pamphlets and do-it-yourself packets for a variety of legal actions (divorces, spousal abuse petitions, consumer complaints, etc.). The task force acknowledges that individuals proceeding on their own may not recognize when their dispute involves a non-routine consideration and also recommends a review by a litigant advocate who can recognize when special skills are needed.

All court personnel will be trained to watch for signs of illiteracy among court users and to offer a variety of services to those who cannot read and write. Functionally illiterate court users need maximum assistance to relate in meaningful ways to what is going on in court proceedings and processes. For example, some criminal defendants are unable to fill out probation forms. Illiteracy services will include provision of a litigant advocate, counsel, or other advocate and referral to a literacy education program. Court personnel will offer these services in a warm and direct manner and will avoid any action that tends to stigmatize or exclude the illiterate litigant.

4. COURT PERSONNEL

All court personnel will understand their job as one of public service, involving a consciousness of serving and

respecting the public. They will treat each person who enters the court system with genuine respect. They will show this respect by the language they use, the careful attention they pay to inquiries and concerns, and the services they deliver. Court personnel will understand their job as one of welcoming litigants and potential litigants into the court system. In welcoming users, court personnel will understand that most individuals enter the court system in periods of trouble, stress, and heightened vulnerability.

Court personnel will be composed of a mix of women and men from all of the ethnic, racial, and cultural groups in the Commonwealth. No one group will dominate the ranks; the kinds of characteristics personnel will share will be ability, commitment, patience and courtesy. The goal is that the backgrounds of personnel are not greatly at variance with the background of court users. The clerks, judges, litigant advocates, probation officers, court officers, mediators, hearing officers, and other personnel of the court will be women and men with Hispanic, Asian, African-American, Caucasian, and other origins and will hail from backgrounds of economic struggle and of economic privilege.

Diversity training and other educational programs will be available for and required of all court personnel on an ongoing basis. These trainings will teach court employees about the many cultures of the Commonwealth's citizens, explore preconceptions, and teach the need for mutual respect and the ways of demonstrating this mutual respect. Other training programs will emphasize the role and responsibility of court interpreters and interpersonal skills. These training programs will be in addition to other continuing educational opportunities and requirements for court personnel.

A number of mechanisms will be in place to ensure the accountability of judges, other decision-making officials, and other court personnel to the public they serve. Judges will be subject to peer review and to a mechanism that takes into account the comments of the public and litigants who appear before them. Judges and all court personnel would be subject to community review and comment on a regular basis.

There will be mechanisms in place to ensure public input into the selection of judges and other judicial decision-makers. The community will be notified, through local press and electronic and other means, of the names of the candidates for judicial posts and will be invited to express their views on their suitability. There will also be mechanisms for the public to offer names for consideration for appointment to judicial posts.

Court personnel will operate under pleasant working conditions. The courts will be adequately staffed to perform their varied functions. Educational and other career development programs will be available to court personnel, and participation in these programs will be encouraged. There will be parental leave policies for court personnel. By 2020 there will also be flexible work arrangements that reflect changes in the nature of the workplace generally. There will be an internal ombudsperson to hear the complaints and concerns of court personnel.

B. Changes in the Delivery of Legal Services

In 2020 every person who needs legal representation or advice for an essential need will have his or her legal needs fulfilled. In order to accomplish this we will have fundamentally changed the structure of the legal services delivery system in the Commonwealth through taking a number of measures.

All persons will be guaranteed the right to representation in all legal matters concerning liberty, integrity, and dignity.⁹⁹ The citizens of Massachusetts will have decided that each and every person in the Commonwealth with an essential legal need has a right to legal representation on that need and will have guaranteed that right by ensuring such representation. Essential legal needs will include help for legal problems regarding housing (e.g., evictions), health care, public benefits, divorces, and other matters involving liberty, integrity, and dignity.

To fulfill this guarantee we will have created a large pool of public legal service providers, redefined the entire legal profession as a public service profession, and taken a broad view of the kinds of services best suited to meet legal needs. The steps we will have taken will include:

1. DIVERSIFICATION OF TYPES OF LEGAL PROVIDERS

There will be many different kinds of legal providers. The bar will have unlocked its grip on the legal profession, and current debate about "practicing law without a license" will have resulted in differentiated forms of assistance provided to users of the justice system. The result will be that proper and convenient performance of such law-associated tasks by those

⁹⁹ See ABA, *Civil Justice*, *supra* note 13, recommending the development of a "civil Gideon." See also Opinion Dynamics, "Public Attitudes Toward the Future of the Courts," (April 1991), which shows public support for making no-cost or low-cost counsel available to poor or middle-class people in civil cases.

known today as paralegals will be acknowledged and the prestige of those legal providers enhanced.

There will be a number of different roles for different types of legal providers in the future, expanding and diversifying those tasks handled by lawyers and others today. One type of legal provider will be trained in the counseling professions and will accompany litigants to court in matters which are legally "routine" but emotionally difficult for litigants. Others will be armed with knowledge of procedures and forms in given areas of the law in which transactions are routine and predictable -- uncontested divorces, real estate transactions, for example. Still others will specialize in administrative practice (utility shut-offs, public benefits decisions).

2. A LARGE POOL OF PUBLIC LEGAL SERVICE PROVIDERS

There will be a large (i.e., adequately sized) pool of government-paid attorneys and other legal providers to represent people without the means to obtain such services.¹⁰⁰ Litigants would be charged a sliding fee based on their income. The funding for these lawyers will come from a variety of sources in addition to general revenues; among these will be:

(1) user fees for court services calculated according to a formula that takes into account the size of the claim the litigant is pressing, the litigant's resources, and the litigant's success in pressing her claim; and

(2) public fines against litigants determined in the course of litigation to have violated public standards (environmental standards, housing codes, civil rights laws, etc.) whose violations necessitated the litigation in the first place.

3. PUBLIC SERVICE REQUIREMENT FOR ALL ATTORNEYS

Although we believe firmly that the public must ensure access to justice for all members of society, we believe attorneys have a special responsibility to help bridge the gap between the need for and the provision of legal services. Public

¹⁰⁰ "Twenty years ago, nearly 20% of law graduates went into public service or public interest law. Today less than 7% do so." Michael E. Tigar, "2020 Vision: A Bifocal View," *Alternative Futures for the State Courts of 2020* (American Judicature Society, 1991) 118.

service will, therefore, be a condition of bar membership. The task force feels this is a necessary step the bar has to take if it is to help society avoid the social chaos that can arise in an individually oriented justice-less society. The task force also believes that attorneys are benefitted and enriched by learning what the consequences of law are for those who cannot afford access to justice on their own. The task force wishes to make real and universal what are now volunteer efforts known in the legal field as "pro bono publico" -- for the public good. The task force recommends that all attorneys be required to be recertified every 10 years and a demonstration that the attorney has participated in a significant amount of public service be one of the requirements for recertification.

The task force also believes that the bar, as an institution, should take the lead in ensuring that opportunities for public service are available to all attorneys. Public service will be broadly construed and will not only mean free representation of individual poor people. The options for fulfilling this requirement will be very broad both in the substantive areas in which attorneys can offer their services and in the means by which they can provide these services. We leave for later decision whether lawyers should be allowed to "buy-out" of their public service obligation but believe that lawyers should be strongly encouraged to contribute by direct service.

4. PUBLIC SERVICE TRAINING REQUIREMENT FOR ALL NEW ATTORNEYS

All new attorneys will spend their first 12 to 18 months of practice as paid apprentices in public service, subject to direction by experienced attorneys. As with the general public service requirement, there will be a wide variety of ways and means for carrying out these apprenticeships. Law students who obtained government or private loans to finance their legal education will be permitted to pay part of the loans back by continuing to work in public service.

5. PRE-PAID LEGAL SERVICE INSURANCE PLANS

There will be a complex of private and public legal insurance plans, which will be considered by 2020 as a new mandatory employee benefit. Employers over a certain size will provide legal insurance (covering, e.g., routine legal matters such as wills and divorce) to their employees. The Commonwealth will provide legal insurance to people who are unemployed or who otherwise do not have legal insurance through their workplace (small employers, seasonal workers, part-time workers, self-employed persons, etc.). These plans will emphasize preventive legal care. They will parallel the universal health insurance plans now in effect.

6. WIDER DISPERSAL OF LEGAL PROVIDERS

There will be walk-in legal clinics, lawyers will continue to advertise, and law school clinics will have expanded such that all law students participate in some kind of legal clinic (counseling, tax preparation, litigation representation, rural legal services, etc.).

7. FEE-SHIFTING STATUTES AND "EQUAL ACCESS TO JUSTICE" STATUTES

There will be in place a set of statutes that shift the cost of litigation in a subset of cases to the losing party such that civil rights, environmental, and other institutional defendants found liable pay the attorneys' fees of their successful opponents.¹⁰¹ There will be in place a statute that shifts the cost of successful litigation against the Commonwealth to the Commonwealth. This is to encourage private parties who undertake litigation that concerns statutory and constitutional rights benefitting all citizens.

III. CREATING THE FUTURE: EDUCATION FOR THE JUST SOCIETY

[S]ometimes the truth is that knowledge is the only thing that is going to let you try to go the next step.¹⁰²

You take the \$8 billion that they were talking about last year adding to the war on drugs and you put it to the war on ignorance in this country.¹⁰³

The single most important thing that we can do to reach the future we hope to live in is to devote our attention to education. Education is the means whereby people learn to think for themselves, earn their own self-respect, recognize their connection to the society of which they are a part, and begin the process of real participation in community life.

The task force addresses education in response to our previous discussion of how we feel many failings of the current justice system are related to social injustice and inequalities.

¹⁰¹ See, e.g., Mass. Gen. L. ch. 12, § 11I (1990), which provides for successful parties in a civil rights action to recover attorneys' fees from the unsuccessful party.

¹⁰² Marie Matava, Commissioner of Dept. of Social Services, Springfield public hearing.

¹⁰³ Leslie Harris, Roxbury public hearing.

Martin Luther King, Jr., spoke of the interconnected nature between education and justice:

Through education we seek to change attitudes; through legislation and court orders we seek to regulate behavior. Through education we seek to change internal feelings (prejudice, hate, etc.); through legislation and court orders we seek to control the external effects of those feelings. Through education we seek to break down the spiritual barriers to integration; through legislation and court orders we seek to break down the physical barriers to integration. One method is not a substitute for the other, but a meaningful and necessary supplement. . . .¹⁰⁴

In other words, the burden of creating fair access to adequate justice rests on the public, not just on the providers of legal services and justice.

Here we address only three areas where massive changes in education are critically important to meeting the task of providing access to justice. We do so in recognition of the pivotal role education plays in reducing crime and enabling people to go to court to help themselves with minimal outside assistance.

A. Elementary and Secondary Education

Apart from the need to revolutionize schools so they better fulfill their primary function of teaching students to read, write, do math, think, and express themselves, schools must include in their curricula courses in legal rights and responsibilities and conflict resolution.¹⁰⁵ To accomplish this schools should develop an institutional affiliation with courts. Judges, other court personnel, lawyers and other legal providers should participate in school programs. Students should visit and observe courts on a regular basis as part of their courses; they should be asked about their perceptions of the justice system and encouraged to think critically about what they see.

Courts should facilitate programs where students work within the system, such as the Judicial Youth Corps, a cooperative

¹⁰⁴ *The Words of Martin Luther King, Jr.* (New York: Newmarket Press, 1983) at 40.

¹⁰⁵ We recommend training in conflict resolution principles, including the philosophy and techniques of ADR and a focus on self-respect and respect for others, be built into the formal educational system beginning at the earliest levels. See, e.g., Prothrow-Stith, *supra* note 79, 173-183.

partnership between the Massachusetts courts and the Boston public schools.¹⁰⁶ One part of this program involved educational sessions to provide students with practical knowledge of the court system and field trips to observe court proceedings.¹⁰⁷ Judges, lawyers, clerks, probation and court officers, and other representatives of the legal community developed mock trial and role-playing activities and explained court proceedings covering a range of topics including criminal law, juvenile justice, and housing and consumer issues. Students were then assigned to work in clerk's offices under the supervision of court personnel. The program also involved teacher training to incorporate law-related education strategies into subject curricula.¹⁰⁸

Schools should set up their own "judicial systems." Peer review panels for student discipline and other matters should become a regular feature of the schools. This will teach students the concept of shared responsibility -- taking responsibility for one another and for the group of which they are a part. Students would use dispute resolution techniques and be advocates for themselves and others to resolve disputes arising in the formal educational system. As they cycle through positions in their "justice system," it will allow them to see disputes from more than one point of view. The benefits are outlined in the words of Mel King:¹⁰⁹

In these institutions our youth aren't dealt with by their peers. And if that is a value in the administration of justice then we've got to take a look at a way for the youth to be dealt with by their peers. . . . I believe that it is a serious gap in terms of dealing with some sense that they are in front of people who in some way could understand them.

Students should be encouraged to become involved in community review panels that discuss the work of the courts. Students should also be encouraged to volunteer in nursing homes, hospitals, other schools (as tutors, gym teachers, computer

¹⁰⁶ Chief Justice Liacos originated the Judicial Youth Corps in response to testimony before the Commission in April 1990 about the lack of job opportunities for youths in the city, saying: "The purpose is to encourage young people to appreciate the important role of our system of justice in society." Supreme Judicial Court Press Release, May 22, 1991.

¹⁰⁷ "State Courts Set Program for Students in Boston," *Boston Globe* (May 19, 1991).

¹⁰⁸ Supreme Judicial Court Press Release, May 22, 1991.

¹⁰⁹ Roxbury public hearing.

skills teachers, etc.), prisons, courts, and other social institutions. Programs to pay students should be developed wherever possible and necessary (high-school students should be able to make minimum wage working in nursing homes as well as in MacDonald's). Conversely, members of the community should be welcomed into the schools to share their experiences with students. Retired elderly should be especially encouraged to participate in school programs. These kinds of interaction will foster attitudes of caring and responsibility in the crucial adolescent and young adult years, mitigating self-centered and gang-centered attitudes that create problems for the community and for the justice system in particular.

B. Community Education

Education with respect to the justice system should continue after formal schooling ends. Some methods of providing "life-long learning" include sessions at the comprehensive justice centers for new immigrants on basic rights and responsibilities and the availability of services. Others are sessions in which community members meet with court personnel to exchange viewpoints on court practice and rulings. These sessions will give decision-makers as well as people affected by these decisions the opportunity to discuss these matters and to ask questions. Both court personnel and legal providers and the public will be educated in the process. Courthouses and comprehensive justice centers will be available for community functions to ensure familiarity and reduce apprehension about these public places.

In addition, the public will learn about the justice system through extensive public circulation of judicial opinions and plain-language summaries of them. Print and audio tape versions will be available at schools, libraries and comprehensive justice centers. Electronic access will also be available at a nominal price to those who have computers at home or at public computers in schools, libraries and comprehensive justice centers.

C. Education of Court Personnel

As we stated above (see p. 45) in 2020 there will be a variety of education and training programs required of and available for court personnel. These will include diversity training, educational programs in their particular areas of expertise (housing issues, family counseling, etc.), conferences with court personnel in other jurisdictions who address comparable issues in their work, and sessions with the public. Court personnel will be encouraged (it will be considered part of their job) to go into schools, community groups, and other social institutions to learn the concerns of the public and to express their own concerns to the public. Education will be a two-way process.

PART FOUR: SUMMARY OF RECOMMENDATIONS

1. Comprehensive Justice Centers: The justice system should have a wide variety of forums to resolve conflict. Each will be accessible through a "multidoor" comprehensive justice center with personnel to greet and guide potential litigants. Located in large communities with satellites in smaller communities (essentially ombudspersons who can have access to the resources of the comprehensive center through advanced information and communications technology), these justice centers will be places for members of the public to go to resolve different types of disputes. The following specific recommendations are designed to realize this goal.

Immediate or Short-term Recommendations

2. "Action for Justice": We recommend the creation of a standing committee for access to justice. The group's membership should include court users as well as legal providers, probably for fixed terms. The group should (1) insure the implementation of the immediate-term recommendations of this report, (2) assess how to implement the medium-term and longer-term recommendations and (3) develop its own recommendations and strategies. This group should be constituted with direct links to the Supreme Judicial Court and interact with courts at all levels and other institutions involved directly with the delivery of legal services.

3. Mediation Programs: The newly formed Action for Justice group should examine the existing mediation programs and determine if, when and how mediation and other alternative dispute resolution procedures (including "assisted mediation" and "community-wide" mediation) should and can be employed.

4. Compliance with the Americans with Disabilities Act of 1990: The Action for Justice group should examine compliance with this federal statute and other ways to ensure communication access in the courts, for example, by investigating other court systems' methods of providing access to the deaf, hearing-impaired, and other disabled persons.

5. Provision of Informational Materials: Similar to jury duty films, video and audiotapes should be available in all relevant languages to explain the proceedings in which litigants are about to participate to inform them what they can expect.

6. Improved Case Scheduling Practices: Trials should be continuous except in unusual circumstances; and court dates should be scheduled well enough in advance (and adhered to) to

enable litigants to make plans to cover family and occupational responsibilities.

7. Diversity Training in the Courts: Diversity training programs for court personnel should be undertaken immediately. These training programs should enable people of many cultural backgrounds to work together and respect all members of the public.

8. Programs to Link Schools and Courts: These programs will enable court insiders (e.g., judges, court personnel, and lawyers) to visit schools, and students to visit and work within the courts. Peer review panels and conflict resolution curricula should be developed and expanded.

9. Programs to Link Communities and Courts: A variety of discussion mechanisms should be implemented between court users, legal providers, and court personnel in order to engage in an ongoing critique and revision of rules, practices, and procedures in the courts.

10. Court Facilities: Multilingual signs throughout court facilities should be provided.

11. Court Services: Complete staffing of linguistic interpreters should be available.

12. Court Personnel: Public service consciousness, diverse composition, and improved working conditions should be developed.

13. Education: Community and court personnel education programs should be implemented.

Medium-Term Recommendations

14. Sophisticated Information Technology: Courts should incorporate state-of-the-art information and communications technology to inform people about court processes and procedures (e.g., placing interactive videos at the information booths/reception desks in courthouse entry areas, and later in comprehensive justice centers).

15. Partnerships between Courts and Other Social Institutions: Courts should build working relationships with other major social institutions, such as universities and corporations, to utilize their expertise and resources and to educate the social institutions about the judicial process.

16. Increased Resources for the Justice System: Increased resources for the judiciary and district attorneys, public

defenders, and legal services, and perhaps use of the individual calendaring system, will reduce delay in adjudicating disputes.

17. Court Organization: Various forums to resolve conflict through the "multidoor" comprehensive justice center should be instituted and institutionalized.

18. Court Facilities: Expanded court operating hours, courthouse cafeterias, courthouse-affiliated daycare facilities and separate waiting areas for victims and defendants should be provided. Location of court facilities and transportation problems should be addressed.

19. Court Processes and Services: Complete staffing of "cultural interpreters"; computerized scheduling; court referrals to social service programs outside the courts (including illiteracy services); court provision of "litigant advocates"; simplified forms; information "do-it-yourself" packets; and computerized instruction programs should be provided.

20. Court Personnel: Public accountability mechanisms for judges, other decision-making officials, and other court personnel, as well as mechanisms for public involvement in the selection of judges and other judicial decision-makers should be developed.

21. Delivery of Legal Services: Diversification and dispersal of legal providers; prepaid legal service insurance plans; and fee-shifting and "equal access to justice" statutes should be undertaken.

Toward 2020: Longer-Term Recommendations

21. Delivery of Legal Services: Guarantee the right to representation in all vital legal matters; develop a substantial pool of public legal service providers; develop public service programs for law school graduates and lawyers; acknowledge public service as a condition of bar membership by requiring attorneys to be recertified every 10 years with the prerequisite of a significant amount of public service.

We are now faced with the fact that tomorrow is today.
We are confronted with the fierce urgency of now. In
this unfolding conundrum of life and history there is
such a thing as being too late.

The Words of Martin Luther King, Jr., (New York: Newmarket Press,
1983) 90.

